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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

—against—

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, *et al.*

BRIEF FOR RESPONDENT EUGENE F. O'CONNOR, JR.

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SYDNEY KRAUSE,
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Of Counsel.

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—against—

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, *et al.*

BRIEF FOR RESPONDENT EUGENE F. O'CONNOR, JR.

Statement.

This case is presented on a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review an order modifying an order of the District Court for the Eastern District of New York, fixing the statutory compensation of the referee in bankruptcy in a bankruptcy composition (R. 102-114; 151-163).

For the opinions below, see 6 F. Supp. 549, 551 and 74 F. (2d) 61.

Question Presented.

The record below presented for review the following question of law:

> In a composition in bankruptcy where the liabilities total $13,008,038.30, and creditors are to be paid 100%,

are the referee's commissions, as prescribed by §40-a (11 USCA 68a) of the Bankruptcy Act, to be computed on the total claims $13,008,038.30 as "the amount to be paid to the creditors", or on $4,812,974.17?

Fees of referees are not paid on a salary basis[1] but are arbitrarily regulated by the bankruptcy statute. In case of a composition they are fixed at

> "one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition" (§40-a, 11 USCA 68-a).

The authorities universally hold and Circuit Judge A. N. Hand in his dissenting opinion agrees that:

> "It is perfectly true that referees' commissions have *ordinarily*[2] been figured upon the par value of notes that have been offered by a bankrupt in a composition • • •" (R. 161).

The referee as by statute[3] and rule[4] required in reporting the administration expenses in conformity with existing authority and established usage certified his commissions "on the amount to be paid to creditors", on the total amount of claims scheduled, filed or allowed, namely, $13,008,038.30 (R. 65). The District Judge in approving the composition rejected this computation and instead (R. 97),

> "Ordered (10), that the amount to be paid to creditors upon the confirmation of said composition is hereby

---

[1] February 5, 1935, a bill was presented to Congress and referred to the Committee on the Judiciary to provide for the Presidential appointment of referees instead of by district judges, with a provision that (§40) "the salaries of referees shall be fixed by the conference of circuit judges at rates not less than $5,000 nor more than $15,000 per annum. • • •" (74th Cong., 1st Sess., H. R. 5356).

[2] Italics throughout this brief, unless otherwise indicated, are the writer's.

[3] Bankruptcy Act, §12b (11 USCA 30).

[4] Bankruptcy Rule 13 of the Eastern District of New York provides in part that "the referee shall certify: • • • 11. The expenses of administration including *fees* • • • or other lawful expenses, • • •."

> found to be $4,812,974.17 * * * and the amount of compensation to which the referee is entitled herein is hereby fixed at the sum of $24,064.87 * * *"

The circuit court, modifying this order, held that the fees of a referee under the statute are mandatory and arbitrary and not the subject of judicial discretion (R. 159). With respect to an appeal by Fred L. Gross, one of the receivers, on the same record, the circuit court held (as to this point A. N. Hand, *C. J.*, concurring, R. 161):

> "Unlike the compensation of a referee that of a receiver is to be determined in the sound discretion of the court subject to the limitation stated" (R. 159).

This Is a 100% Settlement.

"Referee's counsel" is "challenged" by the bankrupt "to show some authority" for this "mere statement" (p. 9).

We refer the Court to the terms of the offer (R. 9), and the comment of the unanimous circuit court on the first appeal:

> "In the instant case, 85% of the consideration for creditors consisted of modified bonds of the bankrupt." *In re Realty Associates Securities Corporation*, 69 F. (2d) 41, 43 (C. C. A. 2).

We refer to the statement of the bankrupt's president issued to all creditors after the federal indictment "against the executive officers of the company" (R. 62) soliciting their approval of the composition in these words:

> "There has been deposited with the court $1,850,000 in cash, to cover the distribution of 15% of the face value of each bond, and if this modified offer is approved, you should receive your 15% in cash and 85% in adjusted bonds within thirty days. We believe the

value of your bonds will be greatly improved by the early acceptance of this offer of composition" (R. 62).

We refer to the prevailing opinion in the circuit court:

> "In this instance the referee was entitled to have his compensation based on the *entire* amount promised to be paid" (R. 159).

We refer to the comment of the Solicitor General of the United States whose reasoning (cited, *infra*) was adopted by this Court in promulgating General Order XLVIII:

> "An extension agreement is really the same thing as a composition payable 100% in notes, and there is authority to the effect that where a composition is made partly in notes the amount of the notes for the purpose of computing commissions may be considered as the 'amount to be paid creditors'."

Facts.

For a proper understanding of the issues here involved in view of the argument made by the bankrupt it is necessary to indicate these additional facts.

The proceeding from which this appeal arises was commenced by the filing of a *voluntary* petition in bankruptcy on July 10, 1933, by Realty Associates Securities Corporation. The company, hereinafter referred to as the bankrupt, was adjudicated on the same day and by order of the district court the matter was referred in the regular course to Eugene F. O'Connor, Jr., as referee in bankruptcy, to take proper proceedings under the National Bankruptcy Act (R. 2).

Attached to the petition which initiated the proceedings was a corporate resolution, reciting in part that bankruptcy was invoked *"with a view to the*

offering of a composition in bankruptcy" to its creditors (R. 5). No stay of adjudication was obtained by the company to eliminate the appointment of a referee, nor was any effort made to effectuate a composition prior to, or without, an adjudication order (§12-a).

The bankrupt was the owner of assets scheduled at more than $16,000,000 book value (R. 37).

At bankruptcy substantially none of the creditors' claims were due. The first of the three $5,000,000 "bond" issues matures July 1st, 1937. At the petition date, the bankrupt had (R. 7):

Cash in banks	$973,193.91
Marketable securities	2,408,790.43
	$3,381,984.34

The creditors are said to hold "6% gold bonds" (R. 30) or "securities" but actually according to the bankruptcy schedules they are mere "unsecured creditors" (R. 7).

3363 of these unsecured creditors filed claims on their bonds, as general creditors in the amount of $13,008,038.30 and thereby became entitled (except for the composition) to a pro rata dividend distribution (R. 65). Since the claims were provable they thereby became dischargeable (Collier, p. 603, cited *infra*).

By the terms of the composition the old bonds were altered in the important respects noted by Judge Chase (R. 155-7).

All of these changes are evidenced by a new trust indenture a copy of which is attached to the offer (R. 11, 140) and deposited with the clerk of the court (R. 89), and a part of this record (R. 140).

The offer provides that the modifications in the case of all bonds shall be evidenced by an instrument (an allonge or rider) designated as a "Notation of Reduction and Modification" (R. 11). A copy of this instrument is set forth in the new trust indenture (pp. 8-10).

In order that the amount remaining due on outstanding bonds as reduced should be in multiples of $25 provision was made for the issuance of scrip certificates exchangeable within two years for a $25 bond (R. 10). A specimen scrip certificate appears in the indenture (pp. 17-19).

In conformity with the provisions of §12-b, (11 USCA 30), the referee certified the statutory facts to the court and on the return date objection was taken by creditors of the company to the referee's computation of his fees on the basis of the total claims agreed to be paid, it being urged (1) that he is entitled to commissions only on the 15% cash payment, or in no event (2) should his commissions be computed on the basis of more than the then market value of the bonds of the company (R. 105, 6). (The company was at that time in bankruptcy for nine months, R. 2, 3.)

The District Judge rejected the first proposition and approved the second (R. 107).

On the return date of the application for confirmation of the composition, March 23, 1934 (R. 65), the company filed with the court three affidavits, sworn to March 22, 1934 and March 23, 1934, purporting to establish the existing market value of the old bonds of the company as reflected by isolated over-the-counter trading (R. 74, 78, 80). These affidavits ascribed to the bonds a maximum value of 37%. No other proof was submitted to the court. As a re-

sult of these affidavits the District Court held as follows:

> "I conclude, therefore, that the referee's commissions must be figured on the basis of, not 100% of $13,008,038.30, but only* thirty-seven per cent. (37%) of such sum. His commission of one-half per cent. (½%) on that sum is $24,064.87 (R. 119).
>
> * 15% cash, plus 22% as the cash value of the securities."

None of this proof was submitted to the referee at the statutory hearing held before him to report on the composition on February 28, 1934 (R. 3), at which time he was charged under the law in advance of the hearing of the application for confirmation to determine "the cost of the proceedings" (§12b, 11 USCA 30, and Bankruptcy Rule 13, cited, *supra*).

The distribution of the consideration consisting of the 15% cash, the stamping of the old bonds with the "Notation of Reduction and Modification" and the attachment of the scrip certificates are provided for in the order of confirmation, the trustee under the new indenture being designated "distributing agent to distribute the consideration and carry out the terms of said composition as so modified, all under the supervision and direction of the Clerk of this Court" (R. 93, 4). These parties are specifically charged with the duty of calling in all bonds "for notation of reduction by partial payment" (R. 94) and delivering checks, scrip certificates and treasury bonds (R. 96). They are also directed where necessary to receive the bonds for modification (R. 96) and in accordance with the terms of the offer to detach all coupons (R. 11), stamp the face of the bonds as partially paid and "*firmly attach* to each of said bonds an allonge" containing the new terms, it being specifically provided that none of the old bonds are to be enforceable unless stamped in this manner (Indenture, pp. 7, 8).

Unless the face of the bonds are stamped and the rider affixed, there is to be no cash payment, the offer stipulating (R. 9, 10):

> "Such payment of such 15% shall be made to creditors * * * ONLY upon and against presentation of all such presently outstanding bonds * * * for notation of reduction by partial payment and for modification * * * as hereinafter provided."

POINT I.

This Court by new General Order XLVIII (288 U. S. 637) has recently recognized that in a composition or extension, the measure of a referee's compensation is not what creditors ultimately receive but the amount promised to be paid by the debtor.

Petitioners vigorously assert the contrary but an examination of the Solicitor General's memorandum to this Court on the basis of which the general order was promulgated leaves no room for argument on the question.

Under date of April 17th, 1933 this Court promulgated additional general orders in connection with proceedings under §74 (11 USCA 202) of the Bankruptcy Act regulating extensions. Subdivision 4 of new General Order XLVIII bears on the question of "the amount to be paid creditors". It is significant that even in the instance of an extension where no cash is to be paid, this Court has ordered that "the amount of the debts whose maturity is to be extended * * * shall be deemed to be 'the amount to be paid creditors'".

The relevant portion of the general order follows:

> "4. For the purposes of computing the commissions *of the referee* and of the custodian or receiver the term 'composition' as used *in sections 40* and 48 of the Act shall be deemed to include an extension proposal, *and*

> *the amount of the debts whose maturity is to be extended thereunder* and of the debts, if any, to be paid in full on the confirmation, shall be deemed to be 'the amount to be paid creditors' within the meaning of said sections."

In making this rule this Court took cognizance of sound precedent and in the language of Judge Chase rejected a principle "making the amount of the referee's compensation contingent upon the probability of the fulfillment of the bankrupt's promises to make the deferred payments" (R. 159).

This the Court was constrained to do in the face of the construction given the statute by well-recognized authority, never questioned in any court. Text writers[5] on bankruptcy have accepted the following reasoning of Circuit Judge Ward enunciated in 1916:

> "Likewise he (the referee) would not be prejudiced if the creditors had accepted, instead of cash, notes of the alleged bankrupt in settlement *which were never paid*, or if they had released the alleged bankrupt in consideration of receiving notes or property from some other person." *In re Batterman* (C. C. A. 2, 1916), 231 Fed. 699, 700.

That this has been the prevailing and accepted rule for many years, Judge A. N. Hand, in his dissenting opinion concedes (R. 161) referring to a rule binding on respondent during his experience as referee for twenty years.

In promulgating the new general order this Court considered and gave approval to existing authority as exemplified by *Kinkead* v. *J. Bacon & Sons* (C. C. A. 6, 1916), 230 Fed. 362 (certiorari denied 241 U. S. 680). Knappen, *C. J.*, writing for that Court held (230 Fed. at 366):

> "But the 'consideration to be paid by the bankrupt

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[5] Collier on Bankruptcy, Vol. I (13th ed. 1923), page 982.

to his creditors' *may or may not be cash*. A bankrupt usually does not have enough ready money of his own to carry out a composition. The 'consideration to be paid' may be the bankrupt's notes, secured or even wholly unsecured *or his mere promise to pay* in the future a given amount. 2 Loveland on Bankruptcy (4th Ed.), page 1264. It is common knowledge that compositions sometime contemplate the taking by creditors of stock or securities under a reorganization, as in the arrangement under consideration in *Re Kinnane* (D. C.), 221 Fed. 762."

The compensation provided by the new general order was the only possible standard because even before the enactment of the extension statute, the composition section contemplated settlements other than cash. The act provides that upon confirmation of the composition, the bankrupt shall be discharged *"from his debts, other than those agreed to be paid* by the terms of the composition" (§14c, 11 USCA 32c). For a holding that "agreed to be paid" means notes and not only cash see *In re Mirkus*, 289 Fed. 732 (C. C. A. 2), per Hough, *C. J.*

That there is no substantial difference between §§12 and 74 appears from the comment in Remington on Bankruptcy, Vol. 7 (4th ed., 1934) at page 270:

"§3152.03. DISTINCTION BETWEEN 'COMPOSITION' AND 'EXTENSION'.—The apparent novelty introduced by the Amendatory Act of 1933 for the 'relief of debtors' hinging upon the provisions relative to extensions of time for the payment of the debts, is an innovation more apparent than real: for an ordinary 'composition', under bankruptcy act, §12, more often than not accomplishes not only a reduction of debts but also an extension of time within which to pay them. In almost all compositions, part of the consideration distributed to creditors has consisted of notes, secured or unsecured; indeed, it is quite conceivable that, in an estate of small assets, the entire composition might consist of notes to creditors payable in installments, which creditors might feel much preferable to the meagre dividends of a

feasible cash consideration; so, after all, extensions of time for the payment of debts is, on analysis, but one of the usual forms of composition."

It will be observed that the bankrupt has, in effect upon payment of 15% on account, obtained an extension of the maturity date as to the balance of its debt. At the time, as petitioners conceded in the application for the writ (p. 3), the company had liquid assets of $3,331,295.72 in addition to real estate interests of the book value of $13,401,862.62 (R. 7) to meet creditors' claims of $13,008,038.30. In other words from its liquid assets alone, the company could pay a cash dividend to creditors of 25.61 per cent.

Both the Yale and Harvard law school reviews in comments on the case at bar point out that the face amount of a bankrupt's promises would seem to be the standard of computation of referee's fees in view of the new general order.[6]

The bankrupt, however, stoutly maintains "that this Court found it necessary to go further and *change* the existing law" (p. 25) and that "the Circuit Court of Appeals *disregarded* the rule which is the implied foundation of General Order XLVIII, namely, that debts which are merely continued in existence * * *

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[6] 48 Harv. L. Rev. 675, 676 (February 1935):

"But whether the Supreme Court would hold market value to be the proper base is questionable in the light of its Order governing proceedings under Sec. 74 of the Bankruptcy Act and providing that where there is an extension 'the amount of the debts whose maturity is extended thereunder' shall be the base for computing the referee's fees. General Orders in Bankruptcy 48, 288 U. S. 637 (1933), 11 USCA Sec. 53 (1934). While the Order makes no provision as to compositions it may be that consistency requires a similar interpretation of 'the amount to be paid' in cases of composition. *Cf.* (1934) 44 Yale L. J. 164. The difficulties of the present case would be obviated by a salary system basing the compensation upon an official estimate of the work to be done during refereeship. See (1932) 7 J. Nat. Ass'n Referees in Bankruptcy 28; Sen. Doc. No. 65, 72d Cong., 1st Sess., Ser. No. 9507 (1932) 30, 125; *cf.* Bankruptcy Act, 1914, 4 & 5 Geo. V. c. 59, Sec. 134."

do not constitute payments to creditors upon which officials can claim commissions" (p. 25).

Counsel for Realty Associates, Inc. urges further (p. 5):

> "Quite the contrary. *Expressio unius est exclusio alterius.* The fact that the Supreme Court declared that in extension proceedings pursuant to Section 74 (as contra distinguished from composition proceedings pursuant to Section 12) the Referee's fee should be computed on the basis of the extended obligations, indicates that the *Court declined* rather than that it intended to make such a rule in reference to the ordinary composition in bankruptcy."

Instead of indulging in conjecture and surmise it is but necessary to examine the comments of the Solicitor General, addressed to this Court, in support of the proposed general order, adopted pursuant thereto, which explains its genesis and the clear intent to make the existing rule applicable:

> "No specific provision for the compensation of the referee and the custodian or receiver is contained in Section 74. Section 74 (m), however, provides that 'in proceedings under this section * * * the title, powers, and duties of its officers and, subject to the approval of the court, *their fees* * * * shall be the same as if a voluntary petition for adjudication had been entered' on the date of the filing of the petition. Congress must, therefore, have intended that section 40 (which governs the compensation of referees) and section 48 (which governs the compensation of receivers) should apply to section 74. Section 48 (d) provides that in a composition the receiver's commissions 'shall not exceed one-half of one per centum of the amount to be paid creditors on such composition'. Therefore, if the receiver is to be allowed any compensation in the case of an extension, the extension will have to be treated for the purposes of section 48 as a composition, and it would follow that the amount of the claims whose maturities are extended should be considered as the 'amount to be paid creditors'. The referee also is entitled in a composition to one-half of 1% 'on the amount to be

paid creditors' (section 40). An extension agreement is really the same thing as a composition payable 100% in notes, and there is authority to the effect that where a composition is made partly in notes the amount of the notes for the purpose of computing commissions may be considered as the 'amount to be paid creditors'. *Kinkead* v. *Bacon* (C. C. A. 6th, 1916), 230 Fed. 362 (certiorari denied, 241 U. S. 680); *In re Batterman Co.* (C. C. A. 2d, 1916), 231 Fed. 699; *In re J. B. White & Co.* (D. C. Ga., 1915), 225 Fed. 796. See also *In re Mills Tea & Butter Co.* (D. C. Mass., 1916), 235 Fed. 815."[7] (Italics, the Solicitor General's.)

The bankrupt argues (p. 32) "fairness forbids that a Referee should be paid on the basis of a sure thing, when creditors at the best still have the risk" of non-payment. Is the risk any the less in the case of 100% extension, in which this Court has definitely indicated that ultimate payment is not the test?

That no other test is possible under the statute as now written forcibly appears from the reasoning of Judge Chase in the case at bar (R. 156):

"What is meant by 'amount to be paid' is not confined to cash but includes whatever the composition agreement provides for. *Kinkead* v. *J. Bacon & Sons*, 230 Fed. 362. The composition agreement is a bargain which the bankrupt makes with his creditors to release his property from creditors' claims and secure his own discharge in return for the 'amount to be paid' which he has offered and which has been accepted by sufficient creditors and approved by the court as the Act requires. *Myers* v. *Internat. Trust Co.*, 273 U. S. 380."

In this connection the bankrupt argues (p. 29):

"The Bankruptcy Act does not contemplate that the Referee should be paid a percentage *on what the creditors did not receive.*" (Italics theirs.)

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[7] "Memorandum to the Chief Justice and Associate Justices of the Supreme Court of the United States, Proposing Amendments and Additions to the General Orders in Bankruptcy and Additions to the Official Forms", submitted by Hon. Thomas D. Thacher, Solicitor General, and Lloyd K. Garrison, Special Assistant to the Attorney General, April 3rd, 1933, pages 31, 32, note 50; see also note 51.

This argument is completely at variance with the holding by the second circuit, in the language of Ward, *C. J.*, who states (231 Fed. at 700):

> "Likewise he (the Referee) would not be prejudiced if the creditors had accepted instead of cash, notes of the alleged bankrupt in settlement *which were never paid*, • • •."

As against this judicial statement, certainly until expressly rejected by this Court, binding on the referee, we have the conjecture offered in its brief by Realty Associates, Inc.:

> "The statute does not require and common sense is shocked at the thought that the Referee's commissions should be predicated on the bankrupt's hopes and promises" (pp. 5, 6).

This Court has done exactly that in promulgating General Order XLVIII, directing that the referee's commissions shall be computed on the "amount of the debts whose maturity is to be extended thereunder" which as Judge Ward indicates *may never be paid* and are nevertheless the aggregate of "the bankrupt's hopes and promises" to borrow the words of the creditor-petitioner.

The bankrupt argues that the result of this principle offends against "good conscience" and is "clearly excessive or really grotesque" (pp. 41, 2). The other petitioner's "common sense is shocked".

The emotional approach, it is submitted, to a pure question of law involving the express terms of a statute should preferably be addressed to Congress which is now dealing with the subject, for as demonstrated in the next point heading contrary to the bankrupt's claim (p. 42), the law is mandatory.

It is suggested by petitioner, Realty Associates, Inc., that (p. 4) "In the ordinary composition case as is well known, the services required of a Referee

are far less exacting than they are in the ordinary case of administration". Solicitor General Thacher, however, who, according to this Court, "had devoted much time and thought to bankruptcy proceedings[8] * * *" has on the other hand, recommended that referees' fees should be increased to 1%[9] because in composition cases referees have more work to be done[10]. The bankrupt in the same vein urges that "a composition effected relatively quickly" (p. 33) merits lesser compensation; in the case at bar the referee controlled virtually two compositions because of the resubmission occasioned by the bankrupt's illegal agreement to compensate bondholders' counsel, and had the second composition failed, no matter how arduous his services, his compensation would be measured by the strict term of the statute.

POINT II.

As five circuit courts have already held, a referee's compensation is arbitrarily fixed by the bankruptcy act with no opportunity for judicial discretion.

The same statute which prevents an award of adequate compensation in ninety per cent. of the filed cases prevents interference with liberal compensation in an isolated and exceptional case.

As has been indicated by the Solicitor General the applicable principles of law which govern officials of the court in fixing their statutory compensa-

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[8] See *Lerner* v. *First Wisconsin National Bank*, decided by this court February 4, 1935, —U. S.—, in which Mr. Justice McReynolds (cases #292 and 496) refers to the "Donovan Report" and the "Memorandum to the Chief Justice and the Associate Justices".

[9] "Donovan Report", March 22, 1930, on "Administration of Bankrupt Estates" at pages 58, 192; (this report also printed 1931 for the House Judiciary Committee, 71st Congress, 3rd Session).

[10] Ibid. 214, recommending increased referees' powers also, 58, 192.

tion in composition cases involving cash and notes, have been clear and uniformly applied. If the magnitude of the case is to be the criterion, bankruptcy referees should be so advised and some appropriate action taken by the Court to insure to its officers at least reasonable compensation in the many cases where they today receive nothing. Some remedy should be found for situations where referees act for little or no remuneration as *In re Morris Bros.*, 8 F. (2d) 629, 630 (D. C. D. Ore., 1925), in which Judge Bean, dissatisfied with the result, holds "It may be that this will work a hardship in some cases and perhaps in the instant case; but that affords *no reason why the law as written should not be observed.*"

If this case involved a fee of $650, or to take a more usual figure of $65, instead of $65,000, there would be nothing to consider but the application of the statutory mathematical formula of one-half of one per cent. times the amount of claims filed, for it was clearly the intention of Congress that the compensation should be automatic. This definitely appears from a study of the unfortunate conditions which existed prior to the enactment of the statute in 1898. In the appendix (see pp. ii, iii) there have been collated statements of various responsible authorities reviewing the mischief which the statute sought to correct. For those reasons which have been well summarized[11] by District Judge Waddill, the statute is rigid and mandatory.

In 1915 in a case[12] in which a member of this Court

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11 *Bray* v. *Johnson* (C. C. A. 4, 1908), 166 Fed. 57, 60. (See Appendix, p. iv.)

12 *American Surety Co.* v. *Freed* (*In re Breakwater Co.'s Estate*) (C. C. A. 3, 1915), 224 Fed. 333, 339, reversing 220 Fed. 226.

(Mr. Justice Roberts), participated as counsel for the trustee and referee, Circuit Judge Woolley held:

> "• • • Congress intended by the amendments to Section 40a • • • and by Section 72, to relieve the courts of the necessity of determining what constitutes legal compensation for those officers" (224 Fed. 339).

§72 of the Bankruptcy Act provides:

> "SEC. 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any *other* or further compensation for his services than that expressly authorized and prescribed in this Act" (11 USCA 112).

Referring to a fully administered case, Judge Waddill said of the statute (166 Fed. 59): "This language is clear, and its meaning too plain to admit of controversy. It is as positive as its purpose is apparent, to fix definitely what this judicial officer shall receive from the funds coming under the administration of the court, as to which he might be called upon to take official action."

It is because of such decisions and the language of other circuit courts that Judge Chase, in the instant case, made the following observation:

> "While it might be well by statute to give the court some discretion in fixing the compensation of a referee as was suggested *In re Columbia Cotton Oil & Provision Corporation*, 210 Fed. 824 [C. C. A. 4], it is impossible now to do anything but allow the arbitrary amount computed as the statute requires whether in given instances that be more or less than is reasonable. *Kinkead* v. *J. Bacon & Sons, supra* [C. C. A. 6]; *McMillan* v. *U. S. Fidelity & Guaranty Co.*, 22 F. (2d) 155 [C. C. A. 8]" (R. 159).

Is the law to be enforced "as written" or the purpose of the statute thwarted by deviations and strained refinements because the result is unsatisfactory? And at what point is this disintegrating process

to terminate? Will the Court exert its great power to alleviate the cases of hardship in the ordinary situation which is daily presented to these same referees?

Circuit Judge Coxe, writing for the District Court, in the Northern District of New York, in 1899, held on the general subject in *In re Langslow,* 98 Fed 869:

> "That this fee is wholly inadequate in many cases cannot be denied, but the remedy, of course, is with Congress. The Court has no power to enlarge the statutory fee."

Is it not then axiomatic that if the court has no power to enlarge the statutory fee, it cannot direct a diminution? Such a logical conclusion has been arrived at by District Judge Lochren, in *In re Barber et al.,* 97 Fed. 547 (D. C., D. Minn., Fourth Div.), stating:

> "His (the referee's) commissions are fixed *absolutely* by the terms of the act, and cannot be increased, however inadequate they may appear in view of the amount of services actually performed by the referee, *nor diminished* in the rare cases where they may seem to afford a very generous compensation for such services."

Circuit Judge Carland, in *United States* v. *Ward,* 257 Fed. 372, 376 (C. C. A. 8, 1919), stated "that the allowance of compensation by the District Court, other or different, or in addition to, that provided by the bankruptcy law for services clearly imposed upon a referee by said law is beyond its jurisdiction and void, and its judgments may be attacked collaterally". The court summarized the situation with this statement:

> "The statute prohibits the court from exercising any judgment in the matter" * * * (p. 376).
>
> "There is a duty imposed by law on referees to receive none but legal fees" (p. 378).

It is submitted that it is not the legislative intention that the Court may substitute its judgment for

the provisions of the statute when the fee becomes too large. The rule in either case is exactly the same. The remedy rests with Congress, as was indicated in 1926 by District Judge Clark, writing on another question, for the Circuit Court of Appeals, in the Third Circuit, in *In re Press Printers & Publishers,* 12 F. (2d) 660, in which at page 662, the court held:

> "We freely concede that the present compensation of referees may be inadequate, in view of the important service rendered by them. *We believe that the remedy lies in amendment of the Bankruptcy Act.*"

Mindful that the statute generally operates unfairly, district judges have endeavored to soften its effect but the appellate courts have uniformly frustrated such attempts by pointing out that extraneous circumstances such as the amount that the referee will receive whether excessive or inadequate is beside the question since the court has no discretion in the matter.[13]

Circuit Judge Kenyon[14] disposed of a referee's claim that "in equity and good conscience he was entitled to reasonable compensation on a basis of *quantum meruit*" by deciding

> "There is no provision of law for compensation to a referee based on *quantum meruit.*[15]

While some of the language quoted is from fully administered cases, it is submitted that the fact that

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[13] *In re Meadows,* D. C., N. Y., 1912, 199 Fed. 304, 309, affirmed (C. C. A. 2, 1914), 211 Fed. 948, cert. den. sub nomine, *Hotchkiss v. Lynn,* 234 U. S. 763.

[14] *McMillan v. U. S. Fidelity & Guaranty Co.,* 22 F. (2d) 155, 157 (C. C. A. 8, 1927).

[15] The district judge in the case at bar determined the problem on the basis of "good conscience" and "fair value" (R. 107, 110).

the parties are disposing of the matter by a settlement in bankruptcy can in no wise affect the statutory provisions for it has been stated:

> "A composition is a settlement between the parties, with the approval of the Court, and the general rule is that settlement between parties *cannot deprive the court officials of their statutory costs.*" *In re J. B. White & Co.*, 225 Fed. 796, 797 (D. C. Ga. 1915), Speer, *D. J.*

As has been indicated, our entire system of compensating officials of the bankruptcy court has been borrowed from the surrogate practice:

> "The present method is doubtless an adaptation of the State systems for compensating executors, administrators, receivers, and the like."[16]

Reverting to cases of executors' commissions now regulated by a graduated statute,[17] the reasons for a hard and fast rule have been aptly summarized as follows:

> "This claim overlooked the obvious intent to make the sums, called commissions, compensation not for the service of receiving and paying, but compensation for the whole services *measured* by a *fixed standard*. Sometimes it would, doubtless, be quite inadequate to compensate for the labor, care and pains bestowed. Sometimes the compensation would be liberal. But the point of importance was to make the amount in each case definite, so that there should be no possible temptation of pecuniary interest to influence the conduct, or mislead the discretion of the executor or other trustee in similar relations."[18] (Italics the Court's.)

The bankrupt refers (p. 22) to *American Surety Co.* v. *Freed*, 224 Fed. 333 (C. C. A. 3), reversing *In re Breakwater Co.'s Estate*, 220 Fed. 226 (D. C. E. D. Penn. 1915).

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16 Collier on Bankruptcy, vol. 2 (13 ed. 1923), page 1074.

17 New York Surrogate's Court Act, §285.

18 *Collier* v. *Munn*, 41 N. Y. 143, 147 (1869).

The *Freed* case, in which Mr. Justice Roberts acted as counsel, peculiarly illustrates a not infrequent set of facts. The court was called upon to administer substantial assets heavily encumbered. After considerable negotiation with many parties interested, a plan was evolved pursuant to which the assets for a cash consideration of $75,000 were sold to a corporation formed to take over the property and in which secured and unsecured creditors received preferred and common stock, respectively. Recognizing the injustice of limiting the referee's fees to the statutory commissions of one per cent. of $75,000, or $750, in view of the services and responsibilities of the court, since the property involved was valued in excess of one million dollars it was stipulated by the parties that both the referee and the trustee should each receive a lump sum of $6,500 for their services. In the District Court, which approved the arrangement, it was held by Judge Thompson (220 Fed. 229):

> "A large part of the brief and argument of the petitioner was devoted to criticism of an arrangement made prior to the sale by which the referee and trustee agreed to accept $6,500 each as their fees in order to have the sale consummated in pursuance of the organization plan. *It is urged that the referee, being a judicial officer, should not be allowed fees fixed by agreement in advance of sale.* It appears, however, that the agreement was to accept less fees than he might have claimed, and that the plan would probably have failed and the value of the property would have been wiped out by foreclosure then pending if the referee or trustee had insisted upon claiming full statutory fees. Congress has seen fit to fix the compensation of referees upon a percentage basis which, in every case, results in the referee primarily fixing his own fee. The referee is no doubt frequently embarrassed by being called upon to fix his own compensation. It goes without saying that he cannot use his position for the purpose of obtaining

larger fees than the law allows, neither should a litigant take advantage of the position in which the referee is placed, by impugning, without justification, the motives of a judicial officer of this court with unquestioned reputation for high standards of honor and ethics."

At page 230, the Court continued:

"In allowing a trustee compensation on a commission basis, Congress apparently intended to stimulate that officer to all possible activity in the interest of creditors. Owing to the industry and business acumen of the trustee and his counsel in this case, the general creditors share in the benefit derived from the assets of the company."

The Circuit Court refused to approve this arrangement, reversed the District Court, and held:

"We can find no authority in the law for an allowance of referee and trustee commissions upon such a basis. *It is to be regretted that there is no law authorizing* compensation to a referee and a trustee proportionate to the difficulties encountered in administering an estate of the character of the bankrupt in this case" (224 Fed. 340).

The decision strikingly illustrates as Judge Chase in the instant case has held: "The compensation of Referees is only what the Bankruptcy Act allows" (R. 155).

Referees may not stipulate their fees or enter into any private arrangements with respect thereto, lest as in the *Freed* case, the propriety of their conduct be attacked.

Judge Rose, writing for the Fourth Circuit in *Columbia Cotton Oil and Provision Corporation, Varney* v. *Harlow,* 210 Fed. 824, held at page 828:

"It might be that a discretion to reduce the allowance when it seemed just and expedient so to do, might by statute be wisely conferred upon the courts."

In the *Kinkead* case (cited *supra*), Circuit Judge Knappen of the Sixth Circuit has said (230 Fed. 362, 367):

> "The statute merely makes a universal, and thus somewhat arbitrary rule for payment of compensation. * * * It is notorious that in many cases the statutory fees for specific items of service furnish inadequate compensation for the entire administrative work involved."

Referees' compensation is notoriously inadequate. There is no basis for disturbing well settled and established precedent in what is necessarily an unusual case because (a) the new corporate reorganization statute has rendered the question virtually moot and academic (b) the result in the case is avoidable under existing recognized practice.

The subject of bankruptcy and particularly referees' fees has been a matter of intensive study within recent years. Solicitor General Thomas D. Thacher, in a report prepared at the direction of President Herbert Hoover, has strikingly indicated that the compensation of referees is generally inadequate. His report commenting on "Meager Compensation and Lack of Incentive", with respect to total cases filed in 1930 indicates the fact not generally realized:

> *"Thus 95.8 per cent had assets of less than $5,000.* Two per cent had assets of from $5,001 to $10,000, 1.65 per cent had assets of from $10,001 to $50,000, *0.55 per cent had assets of over $50,000."*[19]

It is evident that the case at bar involving substantial assets is an extremely rare occurrence, since more than 95 per cent. of the cases filed "had assets of less than $5,000." The instant case falls in a category which represents only *fifty-five one-hundredths of one per cent.* of the total cases filed.

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[19] Strengthening Procedure in the Bankruptcy System, Sen. Doc. No. 65, 72d Cong., 1st Sess. (1932), at 7; referred to by this Court as the "Report of the Attorney General" in *National Surety Co. v. Coriell*, 289 U. S. 426, 437, 438 (1932).

The report quoted, surveying the average compensation per annum of all the referees in the country based upon total compensation from all sources for the five fiscal years ending June 30, 1930, establishes that out of 501 full and part time referees, 60 per cent. averaged $2,000 or less per annum; 20% averaged $5,000 or less; 12% averaged between $5,000 and $10,000, and only 8% exceeded $10,000.[20]

The suggestion previously made that this case has added significance because of "depression times" is without substance in view of the creation by Congress of the new corporate reorganization statute, popularly known as §77B,[21] enacted June 7, 1934, several months after the entry of the order approving the composition at bar (R. 101). In view of the greater flexibility of the new statute, it is extremely unlikely that any large company will again employ the rigid composition statute to effect a reorganization.[22] The new law may be further said in substantial cases to render the entire question of referees' compensation academic, for now, for the first time, by virtue of this amendment, Congress, with respect solely to corporate reorganizations under § 77B, has stated that the court may allow a referee in bankruptcy, sitting as a special master, "a *reasonable* compensation and reimbursement for his services and actual and necessary expenses".[23]

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[20] Ibid, at 170, 171.

[21] 11 USCA 207 (B).

[22] Weiner, 34 Col. L. Rev. 1—"• • • Section 77B has met with an instantaneous response on the part of reorganizers. In the brief time that has elapsed since it's enactment last June, the path from equity receivership to proceedings in reorganization has been trodden into a broad highway." (Nov. 1934.)

Gerdes, 12 N. Y. U. Law Quarterly Rev. 196, "Section 77B of the Bankruptcy Act sets up in the federal courts a system for the statutory reorganization of distressed corporations. (201) Prior to the enactment of 77B, the bankruptcy system did not afford adequate relief for corporations in financial difficulties." (Dec. 1934.)

[23] 77 (C) 11; 11 USCA 207 (C) 11.

The cost of administration here involved is one of the bankrupt's own choosing for, as Judge Thacher has pointed out, it is a "well-known fact that insolvent companies with very large assets are normally wound up or reorganized outside of bankruptcy, chiefly through equity receiverships".[24]

The company invoked the processes of this court by *voluntary* petition with full realization of the magnitude of the problems involved. It did not see fit to obtain a stay of adjudication[25] or to adopt the familiar devices employed by other large companies pending settlement with creditors to eliminate administration expenses by permitting the district judges to distribute the composition without the entry of an adjudication order. For instances in which that expedient was adopted and the question of referees' fees in that manner entirely eliminated, a distribution being made under the direction of a district judge, reference should be made to the stock brokerage settlement cases involving millions of dollars.[26]

In the case at bar, the bankruptcy court was not resorted to in order to escape burdensome obligations such as long-term leaseholds. The creditors are all unsecured note-holders (R. 7). Consequently, the entry of an adjudication order was not essential. Having invoked, presumably for valid reasons, the jurisdiction of this court, the voluntary petition indicating that it was filed at the inception of the proceeding "with a view to the offering of a composition in bankruptcy to its creditors" (R. 5), the bankrupt

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[24] Ibid, at 147.

[25] "The practice exists, however, for in 8 out of 70 voluntary cases reported, stays of adjudication were permitted." Thacher, Strengthening Procedure in the Bankruptcy System, page 209.

[26] See *In re Pynchon*, 63 F. (2d) 350; *Matter of Palmer & Co.*, 2 F. Supp. 275; *Guardian Trust Co. v. Stickle*, ancillary receiver of Prince & Whitely, alleged bankrupt, 63 F. (2d) 354, indicating these cases were administered as alleged bankrupts.

should not now complain of conditions which it has itself created or endeavor to escape the burdens which necessarily arise from its own acts.

Petitioners in their certiorari application suggested that (p. 3) "the possibility that a bankrupt corporation may be required to pay excessive fees[27] to referees and other officials interposes a serious obstacle to compositions under § 12 of the Bankruptcy Act and may discourage the use of the beneficent provisions of that section."

This possibility and apprehension is more fanciful than real as statistics and comments, *supra*, indicate. As recently as November 1934, it has been recognized that "there have been relatively few attempts to utilize §12 as a vehicle for corporate reorganization."[28]

POINT III.

In construing the bankruptcy statute, effect must be given to every clause and part thereof. When so construed the language "to be paid" (§40a); "agreed to be paid" (§14c), and "consideration to be paid" (§12b) taken together clearly indicate that the referee's compensation must be computed on both cash and notes.

There is nothing novel in a bankrupt effecting settlement with creditors by means of cash and notes. In the case in which the constitutionality of compositions was for the first time established in 1874, it was also held by District Judge Blatchford, who subsequently became a member of this Court, that a composition was nevertheless payable in money because

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[27] The total administration expenses allowed in this case including maximum allowance to the referee is $154,928.93 against liabilities of $13,008,038.30, or slightly in excess of 1%. (See composition order R. 97, 98, 42, 43.)

[28] Friendly, Some Comments on the Corporate Reorganizations Act, 48 Harv. L. Review, 39, 48. (Nov. 1934.)

a settlement included deferred payments evidenced by notes payable at stated future times.[29]

When Congress enacted an entirely new law in 1898 and made special provision for payment in composition cases, it was cognizant of this important decision and must be presumed to have enacted the composition sections with that authority in mind.

It is therefore apparent that the use of the word "consideration" throughout §12 is advised, particularly when compared with the differentiation in the statute between the deposit of "consideration" for creditors and "money" for priority claims. That this distinction is vital is apparent from the observation of Remington, quoted in the appendix (p. i), and the comment of District Judge Westenhaver.[30]

With that distinction in mind it will be helpful to make a further analysis of the applicable sections.

§40a, which alone fixes the compensation of referees, provides:

> "Referees shall receive as full compensation for their services, payable after they are rendered, * * * from estates which have been administered before them one per centum commissions on all moneys *disbursed* to creditors by the trustee, *or* one-half of one per centum on the amount *to be paid* to creditors upon the confirmation of a composition" (11 USCA 68a).

It will be noted that there is a change in the phraseology used in the act from estates which have been administered before them where there has been no composition, referees shall receive one per centum commissions "on all moneys *disbursed* to creditors *by the trustee*". As to cases where there has been a composition, the phraseology is changed, and it is provided that referees shall receive one-half of one

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29 *In re Reiman*, quoted in Appendix, page v; see also statistical form report to Attorney General, Appendix, page vii.

30 *In re Wayne Realty Co.*, quoted in Appendix, page vi.

percentum "*on the amount to be paid* to creditors upon the confirmation of a composition".

It is not to be inferred that by mere inadvertence the words "*moneys disbursed*" were used in one clause while the words "*amount to be paid*" were used in a succeeding clause. This double change in the wording alone, without reference to any other sections of the act, clearly indicates a purpose on the part of Congress to change not only the amount of the commissions, but also the method of computation. If no composition is made then all that the creditors may receive must be paid to them by the trustee and in such cases the referee's commission of one per centum is calculated upon the monies "*disbursed* to the creditors by the trustee". Necessarily in such cases the disbursements to creditors must be made by the trustee before the bankruptcy proceeding is closed or ended and as the referee is not entitled under the express provisions of §40a to compensation for his services until after they are rendered his commissions in non-composition cases must depend upon completed disbursements by the trustee to creditors. In cases of composition, however, the amounts offered to creditors are not necessarily and in all cases paid in cash. As has been discussed, the bankrupt may offer long time notes, either secured or unsecured. Accordingly, when Congress came to fix the compensation of the referee in composition cases, it provided that this commission should be computed upon the amount which creditors were entitled to receive under the composition offer (in other words, "on the amount to be paid creditors upon the confirmation of a composition"), irrespective of the fact that such amount might not be made up of cash nor paid to creditors immediately upon the confirmation of a composition.

In such cases the trustee does not disburse the amount offered in composition; and as the composi-

tion-offer may be a mere undertaking of the bankrupt to pay a certain per centum at some future time the commission of the referee in composition cases was based not upon the money or the amount actually disbursed or paid to creditors but upon the "amount to be paid" * * * *i. e.*, on the amount which the bankrupt agreed to pay and which the creditors under the compulsion of the majority and the approval of the court agreed to accept.

Therefore, if a bankrupt offers a composition of fifty per centum and agrees to execute his notes therefor to his creditors, payable in one year, or ten, or in a month as the case may be, mere postponement of the time of payment would not deprive the referee of his commission upon the amount agreed "to be paid".

The reason for the use of the words "to be paid" in the foregoing clause is made clear when we examine §12b, which defines the duties of a bankrupt who seeks to have his offer of composition confirmed. That section provides that it is necessary in applying for a confirmation of a composition that * * * "the *consideration* to be paid by the bankrupt to his creditors, and the *money* necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge".

The use of the word "consideration" with reference to what is offered by the bankrupt to his creditors in contradistinction to the use of the word "money" with reference to the amount necessary to pay all debts having priority and the cost of the proceeding, is important as showing that Congress did not intend to limit bankrupts to offers of cash in composition of the claims of general creditors. It was clearly intended to permit a bankrupt to offer to

pay his general creditors a per centum of their claims in stocks, bonds, notes or anything else which the creditors might agree to accept; and thus a mere promise of the bankrupt to pay at some future time, if accepted by the creditors and confirmed by the court, would be sufficient consideration under the above section.

That such was the intention of Congress is indicated by §14c, which provides:

> "The confirmation of a composition shall discharge the bankrupt from his debts, other than those *agreed to be paid* by the terms of the composition and those not affected by a discharge."

If Congress had intended to confine a bankrupt to composition offers of cash and also to require the money therefor to be deposited to the credit of the judge, it is not conceivable why it should provide in any other section that the confirmation of a composition shall not discharge a bankrupt from his obligation to pay what he agreed to pay by the terms of the composition. This circumstance is discussed in Loveland on Bankruptcy, vol. 2, 4th ed., page 1264, and that author is quoted with approval in *Matter of Kinnane*, 221 Fed. 762, 766 (D. C. S. D. Ohio).

The same explanation of §12b is given in Collier on Bankruptcy, 13th ed., 1923, vol. 1 (p. 444), and in Remington on Bankruptcy (Appendix, p. i).

The labored construction accorded the word "upon" in §40a by petitioners excludes any reference to §§12b, 12e and 14c. It is submitted that in the language of Mr. Justice Butler (construing the bankruptcy act):

> "The construction contended for would violate the cardinal rule, that, if possible, effect shall be given to every clause and part of a statute.[31]"

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31 *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208 (1932).

In the case at bar, the bankrupt offered to pay in addition to the fifteen cents in cash, 85% of the balance of the claims proved. In accordance with the promise set forth in the composition offer, the creditors accepted the deposit with the clerk of the court of the evidence of that promise, namely, the indenture. The creditors by consenting to this arrangement did not waive payment of the amount offered to them, but merely waived the making of a physical deposit of 3363 new notes or riders. It is clear, therefore, that §12b, in requiring a bankrupt who applies for the confirmation of a discharge, to deposit subject to the order of the judge "the consideration to be paid by the bankrupt to his creditors" was designed to afford a manner in which the creditor might be secured in receiving what was offered by the bankrupt in composition. This provision for a deposit of the consideration to be paid by the bankrupt to his creditors was inserted solely in the interest of the creditors in order to afford them security. Ordinarily therefore, if a bankrupt offers bonds in composition, such bonds shall be deposited by the bankrupt. If a bankrupt offers merely his unsecured notes, payable at some future time, then such notes shall be deposited unless as is here the case, by agreement of the parties, the actual deposit is waived by the symbolical deposit of one general promise contained in the trust indenture for the benefit of all creditors. In this fashion there is eliminated the necessity for reissuing notes, or escaping burdens of taxation or official registration, or whatever other object may have been sought, without in any wise affecting the obligation of the bankrupt to pay what was agreed to be paid under the offer.

In re Columbia Oil & Provision Corp., 210 Fed. 824 (C. C. A. 4, 1913), indicates that substance rather than form controls. Property appraised at $155,000 was subject to a mortgage of $100,000 and was sold by the trustee and the mortgagee became the purchaser. The mortgagee *paid nothing* into court but simply gave credit for the amount of his purchase on his mortgage bonds. The commissions claimed by the referee were denied in the lower court but the Fourth Circuit Court of Appeals reversed this ruling and held that the referee was entitled to the commissions claimed. At page 827 the court said, Judge Rose writing:

> "It would hardly seem that the Referee's rights should be different merely because for the convenience of the bondholders they were excused from paying in $90,000 and getting $87,955 back. The payment of the latter sum was as effectually made to them by crediting it on their bonds as it could have been in any other form. It does not seem wise to make substantial rights depend upon such unessential differences. The way of making payment adopted in this case is far the simplest and most convenient for everybody. Nothing is to be gained by holding that if it be adopted the referee would lose what would come to him if the more roundabout and troublesome method of doing the same thing were employed."

POINT IV.

Unless the offer of settlement is not submitted in good faith, it must be held as a matter of law that the composition contemplates an ultimate 100% payment to all creditors. In viewing the problem there cannot be a double standard (1) for solicitation of creditors' consents to the settlement and (2) another for computing referee's commissions.

Creditors of the bankrupt—numbering 3363—upon the representation that they are to be paid in full have approved of this settlement. After obtaining

all the consents on that basis, for the purpose of computing the referee's commissions, it is now suggested that creditors have accepted a settlement which in fact does not include payment in full. In other words, what has been here achieved must be viewed in a double aspect, depending (1) on whether creditors' cooperation is being solicited or (2) whether the referee's fees are involved.

It is submitted that this settlement as accepted by the creditors and as offered by the company, contemplates no less than an ultimate distribution of one hundred cents on the dollar.

The opinion of Judge Chase summarizes the situation very clearly:

> "These bonds are in large part physically the same bonds which the creditors held before the composition but because of the composition agreement they are to be altered in material respects by changing the principal amount, the interest rate, and the due date, they are in law new obligations enforceable only in accordance with the new promise they contain which has superseded the old one. *When the holders turn them in and receive them back, so altered they have their old securities no more than they would have if the old pieces of paper were not returned altered by a rider attached but instead new bonds were issued in exchange for the old.* So the amount to be paid in composition in so far as the payment is in bonds stands the same as to the old holders of securities and those who receive treasury bonds not previously issued.
>
> That the debts other than those agreed to be paid by the terms of the composition are discharged by the composition is clear. *Nassau Smelting & Refining Co.* v. *Brightwood Bronze Foundry Co.*, 265 U. S. 269; *In Mirkus*, 289 Fed. 732, and it is settled that the effect of the discharge is to destroy the remedy but not the indebtedness. *Zerelo* v. *Reeves*, 227 U. S. 625. Yet that is only of academic interest on this appeal for by the express terms of the accepted and confirmed composition offer the obligation of the old bonds was by agreement destroyed and supplanted by the new" (R. 156-7).

These creditors are not taking stock in another company as in *Re Mills Tea & Butter Co.* They are not as has been suggested accepting a waiver by the company of its right to a discharge. The creditors had certain rights against the company which were impaired by bankruptcy. They have entered into a new agreement with the bankrupt entirely altering their relationship. By virtue of the composition, all previous obligations except as defined in the new offer are destroyed. This Court has declared in *Nassau Smelting & Refining Works* v. *Brightwood Bronze Foundry Company,* 265 U. S. 269 at 271 (1924) (per Mr. Justice Brandeis):

> "Composition is a settlement by the bankrupt with his creditors. In a measure, the composition supersedes, and is outside of, the bankruptcy proceedings. *Cumberland Glass Mfg. Co.* v. *De Witt,* 237 U. S. 447, 454, 59 L. ed. 1042, 35 Sup. Ct. Rep. 636. It originates in a voluntary offer by the bankrupt and results, in the main, from voluntary acceptance by his creditors. It cannot be confirmed unless there has been such acceptance by the requisite majority. When confirmed, the bankrupt *is discharged* from all debts *'other than those agreed to be paid by the terms of the composition and not affected by a discharge.'"*

This Court again held to the same effect in *Meyers* v. *International Trust Co.,* 273 U. S. 380, 383 (1927).

In a composition, there is no such thing as a waiver by the bankrupt of its right to a discharge. As indicated *supra* by Mr. Justice Brandeis, when the composition is confirmed "'the bankrupt is *discharged* from all debts 'other than those agreed to to be paid by the terms of the composition and not affected by a discharge'."

Upon the happening of bankruptcy, all that remained to creditors was the right to file a proof of claim with the referee and to participate in the

distribution of a dividend thereon. The right to enforce the gold bond, security or note was suspended. The obligation was no longer enforceable. By virtue of the terms of the composition offer and the new promise therein contained, an equivalent obligation was to be assumed upon the confirmation of the composition, 15% of which was to be paid in cash and the remaining 85% to be paid in the future according to the terms of the offer. The promise contained in the composition offer has given new life and meaning to the original bond, now represented by the proof of claim, and the composition offer by the promise therein contained, constituted the issue of a new bond, just as effectively as if the company's officers had sat down and physically written new instruments appropriate in number. That is the legal effect, for the offer after agreeing to pay (1) all priority claims, (2) administration expenses, provides (3) "the amount to be paid to all creditors whose claims are based on presently outstanding bonds * * * and whose claims have either been filed or allowed * * * shall be fifteen per cent. (15%) of the amount of their claims" as filed, allowed or scheduled. Thereafter it is provided that the remaining 85% "shall be evidenced by the existing outstanding bonds as reduced and modified as hereinafter provided". (R. 9, 10).

It is in this term of the offer that the framers have scrupulously refrained from using express language agreeing to pay 85%. However, the last sentence of item 3 of the offer must be read in connection with the first few words, namely, "(3) The amount to be paid to all creditors" or else the bondholders are relegated to an 85% claim "evidenced by the existing outstanding bonds" which under the law will be discharged as a result of the composition.

Boiled down to its essence, the question presented is whether a bankrupt can prevent payment of the referee's commissions by saying in his composition offer, "I will pay all of my obligations enumerated in my schedules but I will give no written instrument to evidence my new promise except as stated in the offer." That is all that this offer amounts to. The efficacy of the agreement to pay rests not in the issuance in this case or in any other of a promissory note or a bond which is merely evidence of the debt, but in the promise to pay. In the language of the decisions construing the statute, "the amount to be paid creditors" can only be the amount agreed to be paid.

The language of Judge Hough in *In re Mirkus*, 289 Fed. 732 (C. C. A. 2, 1923), is very apt. Discussing the effect of a composition Hough, *C. J.*, observed (p. 735):

> "This narrows the inquiry to asking what is meant by the phrase debts 'agreed to be paid by the terms of the composition'. The statute does not say those which are actually paid *in cash*, but those which are *'agreed to be paid'*; and this is but another way of saying (especially in respect of the acceptance of promissory paper) that the agreement to pay is fulfilled by the delivery of the paper—the paper is the agreed method of paying."

Judge Hough it will be noted rejected the interpretation and significance given the word "upon" developed at length by petitioners. He saw no reason for writing into the statutory language "computed on the amount to be paid to creditors" namely "computed on the amount to be paid **in cash**" and he so stated pointing out at 289 Fed. 735:

> "The statute does not say those which are actually paid *in cash*, but those which are 'agreed to be paid'."

If the elaborate interpretation contended for is accepted and the emphasis placed at the word "*upon*" in the statute, then Judge Hough's words are rendered meaningless.

Any other decision amounts to a holding that where the court confirms a composition where notes are being distributed, it does so with full recognition and understanding that the notes which it so carefully distributes are worthless and that none of the parties have any serious intention that they will ever be paid. If this then is the thought, what valid reason is there for the insertion of §14-c in the act?

The statute does not say "agreed to be paid *in cash*" for that would be without sense for the cash is paid *upon* the confirmation of the composition. The only reasonable interpretation to be drawn from the language is the realization that the sum "agreed to be paid" is exactly the same as the "amount to be paid to creditors".

That the giving of notes in composition cases is not an extraordinary occurrence is indicated by the special provision in the court rules governing compositions, stating:

> "if the proposed offer includes any promissory notes, it shall state the names and addresses of the endorsers, if any * * *" (Bankruptcy Rule 11, D. C. E. D. N. Y.).

It is apparent that as far as the parties guiding the destiny of this company are concerned, the composition was not an unmixed blessing, for in addition to giving creditors fifteen cents now rather than in 1937, it gave to the incorporators, stockholders, officers and directors a general release, the new indenture providing that any and all liability existing against these individuals "whether at common law or in equity or by statute or by constitution or otherwise," is "expressly waived and *released* by

the holders of the *stamped* bonds * * * as part of the consideration *for the stamping* of the bonds under this indenture and being also waived and released by the terms of this indenture (Indenture, pp. 66-67)." This is one provision, the existence of which the "informatory allonge" attached merely "by way of information to inform the world" did *not* inform unless the holders of the gold bonds whose rights under the guarantee were being kept intact insofar as possible, took the trouble to examine the trust agreement on file with the clerk of the court (R. 89).

Modification of the Bonds Released the Guarantor.

The bankrupt in its brief (pp. 5, 6, 15-18) justifies the intentionally vague form of its promise to creditors to pay the remaining 85% (see R. 9) by stating that there was no new obligation created "because to substitute a new bond *might* have nullified one of the essential terms of the composition, * * * namely, that any rights under the guaranty of the New York Investors, Inc. are not to be in any wise affected by the composition" (p. 17). The use of the word "might" is highly significant as is the phraseology that the bondholders insisted "that any rights which they have under the guaranty of New York Investors, Inc., *should so far as possible* be preserved and not be affected by the composition" (p. 5). The argument is that the bankrupt studiously avoided making a new promise in order not to impair the rights of creditors to proceed on the guaranty. These guaranties, however, at the time of the composition, were not worth the paper upon which they were written.

The *guarantor,* New York Investors, Inc., went into receivership four days after the bankrupt, as appears from the opinion *In re New York Investors,*

Inc., 5 F. Supp. 15, decided November 13, 1933 (D. C. E. D. N. Y.):

> "It appears • • • that the assets of the alleged bankrupt are held by equity receivers appointed by this court on July 14, 1933."

See also decision dated Sept. 12th, 1933, *In re Allied Owners Corp.*, 4 F. Supp. 684, in which appears the statement at page 685: "Judge Kelby: I am one of the receivers of the New York Investors."

Under these circumstances, how then, can the statement in the provision of the offer (R. 23) that the modification of the bonds "shall be without prejudice to the rights, if any, of holders of such bonds arising out of, under or in connection with the guarantee of said bonds by New York Investors, Inc.", have any value? The final offer of settlement to creditors was signed February 16, 1934 (R. 26), months after the guarantor went into receivership. It is fundamental that the change in the maturity date of the bonds, and the interest rate, to say nothing of the other vital amendments, immediately destroyed the legal effect of the guarantee unless the changes were consented to by the guarantor. No such consent is attached to the offer nor referred to therein, nor is it suggested that the receivers in equity, assuming a court would have permitted them so to do, at any time acquiesced in the claim that the guarantee was still enforceable.[32] If the unsecured creditors, the

[32] The Court actually rejected such an application made by the Manufacturers Trust Company, as trustee under the indenture. The motion denied by District Judge Robert A. Inch, Nov. 3rd, 1933, in *John A. Selby* v. *New York Investors, Inc.*, E70-20 (D. C., E. D. N. Y.) prayed for an order "directing said receivers and/or said New York Investors, Inc., to consent that the annexed offer of composition proposed by Realty Associates Securities Corporation • • • shall be without prejudice to any of the rights of • • • upon its respective guaranties • • • and that said guaranties of New York Investors, Inc., shall remain in full force and effect as though said offer of composition had not been made or approved • • •."

holders of the so-called gold bonds in this case, consented to this composition on the premise that the guarantee of New York Investors, Inc. is still legally binding, then disillusionment awaits them.

The argument on the guaranty is made in connection with the claim that the agreements set up in the new trust indenture constituted neither new bonds nor new promises (pp. 16, 17) because in the language of the district court below, "the old debt persists. It is not discharged; it survives in a modified form". The new terms and conditions, it is urged, are not substantive. They are only informative because "the allonge * * * constitutes merely a notation by way of information" (p. 5) of a 15% partial payment. This informatory allonge notifying the world that the bond was modified, (p. 15) it is urged, constitutes no payment. This informatory allonge is the instrument also known as the "notation of reduction and modification" created at page 8 of the new indenture (designated by Judge Chase as a "rider", R. 157), carrying into effect all of the modifications recited on its face and embodied in the new trust agreement. It is indeed highly informatory telling "the world as it deals with said bonds" (p. 5) that the bonds have only a dividend value since the adjudication in bankruptcy, except for the new life and legal efficacy breathed into them by the promises recited in the trust indenture, for the allonge recites on its face that the bond to which it is attached is "modified so as to be subject in all respects to an indenture dated as of July 10, 1933 * * * and to which reference is hereby made for all the terms and conditions thereof and for a description of the rights of the holder of this bond * * *" (Indenture, p. 8). At page 10 of the Indenture it appears that the allonge recites that the bond and the previous indenture "shall

be deemed to be modified so as to be in accordance with and in no way inconsistent with the terms of the aforesaid Indenture".

The district court opinion is inconsistent in holding that there is no new promise, that "the old debt persists" (R. 106-7) and then proceeding to evaluate the new promise, held to be non-existent. The bankrupt endeavors to overcome this inconsistency by urging: "The other modifications constitute restrictions on the activities of the bankrupt in the future. Any new provisions * * * are merely incidental covenants and not new covenants for the payment of money" and "do not affect the substance" (p. 18). This statement leads one to wonder what are the exact rights of creditors today if, as a matter of law, the old debt is discharged and the company has given no new promise as is claimed. It would appear that any future payments are purely voluntary so far as the company is concerned and not legally enforceable for the bankrupt states that there are no "new covenants for the payment of money". Will this Court reject all the fundamental concepts of a bankruptcy composition and approve this reasoning because the collateral question of how a referee's commissions are to be computed must be determined?

As this Court in *Meyers* v. *International Trust Co.* (cited *supra*), pointed out, a composition is in the nature of a contract, pursuant to which the parties get what "they 'bargained for' and no more".

Why, then, should not the law take its normal course and leave creditors' rights undisturbed?

POINT V.

The affidavits add nothing to the case; they were improperly received, and if of any importance, should have been submitted when the "cost of administration" was being determined, in advance of the return date of the composition as by statute required (§12b).

The statute provides:

> "§12b. An application for the confirmation of a composition may be filed * * * *after, but not before* * * * the cost of the proceedings have been deposited in such place as shall be designated by and subject to the order of the judge."

This presupposes that "the cost of the proceedings" shall have been determined before the return date of the composition. It is for this reason that Bankruptcy Rule 13 (E. D. N. Y.) requires that "the referee shall certify: * * *11. The expenses of administration, including fees * * * or other lawful expenses, * * *."

The attempted proof of the value of the bonds was not filed in the first instance before the referee at the time that the referee was accepting consents of creditors to a 100% settlement. It was submitted *for the first time* in the form of affidavits before the district court on the return date of the composition *after* the referee, as by rule required, had certified the composition and reported the administration expenses (R. 65). The company was at the time of the submission of the affidavits in bankruptcy for nine months (R. 5, 65).

These affidavits, if proper proof, should have been filed in the first instance with the referee, together with all other papers on allowances in accordance with established practice.

It never has been the practice for the district court to take proof *de novo* on allowances; wherever new matter has been tendered, the question has been referred back to the referee, otherwise the certification is an idle ceremony and may as well be eliminated. See the circuit court's opinion on a prior appeal in this case: "The court below properly remitted the proceeding to the referee in bankruptcy for further consideration by the creditors." 69 F. (2d) 44.

In addition to the receiver's request for compensation the referee passed upon a number of other applications, among them the bankrupt's attorney and others (R. 98, 43, 44). Awards were recommended on the basis of the papers before the referee. These parties had their allowances recommended on one set of facts, while the referee was judged on another. It is to prevent that result that the Judges of the Eastern District created Bankruptcy Rule 10 on allowances:

> "10. All applications for allowances to receivers, trustees, appraisers, appointed by the Referee, accountants or attorneys *shall be filed in the first instance* with the Referee in Bankruptcy in charge of the case * * *."

Must all existing procedure be overturned because the bankrupt while filing consents with the referee preferred not to suggest to creditors that they were getting but 37%, and not the promised 100%?

The bankrupt adverts to the presence in court of the referee on the date of confirmation, but does not point out that the referee was present solely as a witness called to testify on a creditor's specifications of objections (R. 67) and that he did not address the court (R. 71) and was not formally represented (R. 66).

Since the referee did not participate in the pro-

ceedings the statement (p. 38) that the affidavits were received without objection adds nothing. That they were filed in open court, as claimed, "on notice (R., p. 57)," likewise proves nothing because the Record at page 57 fails to indicate that the referee was ever served with the document referred to. Certainly the referee is not bound by the contents of an instrument filed with the clerk of the court who is the only party entitled to receive an application for confirmation of a composition. Nor must the referee presume that the ordinary one page official confirmation form as prescribed by this court (No. 61, 174 U. S. App. 1) will be expanded to a fourteen page document.

The statutory hearing before the referee was held February 28th, 1934 (R. 3). The confirmation hearing was held March 23rd, 1934 (R. 3). Two of the affidavits filed were sworn to March 22nd (R. 74, 78), the other March 23rd (R. 80) which gives a clear idea of exactly how much "notice" was intended to be given of the contents of the affidavits.

Assuming *arguendo* that the affidavits were properly received it is apparent that they have no probative force. *Geddes* v. *Anaconda Copper Co.*, 254 U. S. 590, is cited by Realty Associates, Inc. (p. 3) for the proposition that securities having market value are the equivalent of cash. However, it should be noted that this Court stated at page 598 in that case that that principle obtains because *"there was a wide and general market for Anaconda stock"*. The bankrupt also makes the same claim (p. 38) and quotes cases which indicate that the principle does not operate where the market is a restricted one. The true rule applicable has been stated in a taxation case.[33] In-

[33] "Sales made under peculiar and unusual circumstances, such as sales of *small lots*, forced sales, and *sales in a restricted market*, may neither signify a fair market price or value, nor serve as the basis on which to determine the amount of gain derived from the sale." *Heiner* v. *Crosby*, 24 F. (2d) 191, 193 (C. C. A. 3, 1928).

spection of the affidavits will disclose that they are based largely upon isolated sales of small quantities of bonds, the highest in any one day being 13, the sales in most instances amounting only to 1, 2 or 3 bonds (R. 73). Can this be said to represent "a wide and general market"? With the company at the time in bankruptcy for nine months, there could of necessity be no general market. This is apparent when the sales in question are compared with outstanding issues of more than $12,500,000 held by more than 3,300 people.

It is notorious that sale prices, (as the bankrupt itself argues, p. 33), of real estate securities then and now were and are no fair indication of the true value of the bonds. Obviously the sales price of a few bonds in sporadic sales prior to the composition is not a fair test of the real value of the corporation's promise to pay, represented by its new bonds. The absence of a ready market, the uncertainties of the litigation connected with the composition, the possibility that the corporation might be forced into a straight bankruptcy would all tend to depress the price during the period covered by the quotations. Furthermore, the fifteen-point reduction made from the price (37 to 22) on account of the 15% cash payment had no real basis in fact. There was no certainty that the bonds would fall in value on the confirmation of the offer. The rise that should follow the discharge of the bankrupt with the resulting increased likelihood that the creditors would receive a return and eventually be paid might entirely offset the predicated fall.

As suggested, the affidavits add nothing. They were improperly received and their reception was assigned by the referee as error in the circuit court (R. 119).

The bankrupt states that (p. 38) "neither the majority nor the dissenting judge has considered" this argument (as to the reception of the affidavits) "of sufficient merit to mention in either of their opinions". In view of the ruling made, such comment was unnecessary because it was not required by the result.

The anomaly of accepting these affidavits stands out clearly, when it is considered what would be the result of the adoption of this procedure, in the normal composition case handled by referees which involves for the most part notes endorsed by a wife or other relative of a bankrupt. On one side of the shield, the bankrupt, eager to effectuate the composition, will endeavor to exaggerate the value of the promises evidenced by the notes, while on the other side, to minimize "the cost of the administration" he will strain to disparage the value of these same promises. Unless it is required that the proof on both of these issues be submitted at one time it is apparent that the bankrupt may offer proof to meet the exigencies of the particular situation.

How to evaluate the worth of the endorsed promise of the bankrupt's wife or relative presents a further problem. Thereafter is the referee to be plunged further into the controversy in every case by being compelled to make himself a party to the litigation to demand that he receive notice of the application for confirmation in order that he may present himself in the District Court lest the entire question be reopened and further proof accepted? Is the referee to be compelled to hamstring the consummation of a composition because of the incidental problem of his fees? Is it to be the mandate of this Court in the face of the existing statute and rules, that the referee in a case with thousands of creditors

anxious for a speedy determination of this proceeding (already delayed for months by an appeal involving compensation to bondholders' committee counsel), must further protract the proceedings by arising in court and demanding that there be no confirmation of the composition and no distribution until the referee's fees have been properly adjudicated?

The Court must recognize that to accept this principle will likewise involve the receiver and some times the trustee in similar controversy. It would, therefore, seem highly impractical and most unseemly to embark upon this innovation without a further set of general orders which would add to the complexities of administration. This Court should not countenance the frustration of the intended automatic operation of the statute disregarded by the District Court.

POINT VI.

The decree under appeal is joint in form. All of the parties named as appellees in the circuit court have not been joined. In the absence of summons and severance the appeal must be dismissed.

The referee is the only party properly named as a respondent in this proceeding. All the other parties so named except Fred L. Gross are adversary in interest.

As to Mr. Gross it is stipulated in the record (R. 5) that he "has no interest in the outcome of the appeal".

All other parties designated as respondents should in fact be petitioners. Indeed one creditor, Eliza B. Carman, by separate counsel filed a brief (without a petition) as *respondent* in support of the two petitioners' application for writ of certiorari, raising

new matter as to which the referee was precluded from making reply.

It is to prevent such a recurrence that the matter is called to the Court's attention.

Realty Associates, Inc., a creditor is exactly in the same position as the other creditors, but properly was a party to the petition for certiorari, joined in only by the bankrupt.

The decree under appeal is a joint one as appears from its terms referring to "appellees" (R. 165, 1).

In the appeal by the referee to the circuit court all the parties designated as respondents were named as appellees (R. 3-4).

These appellees are all interested parties, appeared in the district court, were heard (R. 66, 67) and as appears from the bankrupt's brief are affected by the outcome:

> "• • • the court may properly bear in mind that the money and assets which were returned to the bankrupt after the confirmation of the composition are in reality still held for the benefit of bondholders to the extent of their rights under the outstanding bonds retained by them. Therefore, any and all amounts paid to the Referee will be taken out of moneys which might otherwise be applicable to the ultimate payment of bondholders" (pp. 43, 44).

Having omitted to summons and sever as to interested parties who have not joined in the appeal, it must therefore be dismissed. *Pflueger* v. *Sherman*, 293 U. S. 55 (1934); *Elliot* v. *Lombard*, 292 U. S. 139, 141, 142 (1934); *Hartford Accident and Indemnity Company* v. *Bunn*, 285 U. S. 169, 178, 182 (1932); *Bloomingdale* v. *Watson*, 128 Fed. 268, 269 (C. C. A. 4, 1904).

CONCLUSION.

A special rule cannot be made to control large cases under the guise of a "just and reasonable construction" of the statute as urged by Judge A. N. Hand, because the door will be opened thereby to enlarge compensation in the vast majority of situations. As this case illustrates, the statute is rigid and mandatory and leaves no alternative to this Court but to affirm the decision below and thus point the way to Congress for remedial legislation.

Respectfully submitted,

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APPENDIX.

Remington on Bankruptcy, vol. 7, 4th Ed., 1934 (p. 200):

"§3092. WHETHER CONSIDERATION ALWAYS TO BE IN MONEY.—Whether the consideration must always be money is not clear. The wording of the section is very significant—the use of the word 'consideration' instead of the word 'money' in the part that relates to what shall be deposited for the creditors, and the use of the word 'money' in the part that provides what shall be deposited to pay costs and priority claims; also the necessities of the situation itself—the bankrupt usually having little opportunity of getting money—are likewise significant, *and point to an intention on the part of Congress to leave it possible for the bankrupt to obtain a composition on the strength of depositing for creditors something else than money, as, for instance, his promissory notes,* secured by endorsement or by mortgage upon the property thus redeemed by him from the bankruptcy; or part in cash and the remainder in promissory notes; or perhaps, as discussed in §§3074, 3094, shares of stock; or by a creditors' committee supervising the business until the composition percentage is paid, and on default taking possession, surplus to go to the bankrupt.

The law of 1867 provided for the payment or satisfaction in money in contradistinction from other property; but nevertheless, even under that law compositions were held proper that were effected by the giving of notes. It is still to be considered a payment in money, though the payment is deferred or made in installments.

Thus, where, in accordance with a composition offer, the bankrupt deposited his promissory notes, secured by a trust deed of all of his property, the court is not justified in holding that the proposed composition is not a composition at all within the meaning of the Bankruptcy Act; but the proper practice would be to hear the objections to the offer and determine whether or not the composition was for the best interests of creditors."

Excerpts from report of Attorney General, cited *supra* (p. 23).

For an analysis of bankruptcy legislation, see Solicitor General Thacher's "History of the Bankruptcy Act and Comparative Legislation" (p. 49). Discussing the problem of fees, the report states (p. 53):

"The administrative machinery of the Act of 1867 caused much dissatisfaction and led speedily to repeals * * * Of far more importance was the fee system. The referees were compensated in each case by an elaborate schedule of fees, the effect of which was that the more they multiplied the steps in any proceeding the larger were their emoluments and these fees had to be paid by the persons for whom the services were rendered. The trustees received commissions of 5% on the first $5,000. of assets and a sliding scale downward on assets above that amount; they were, in addition, permitted to charge for all their expenses of whatever nature, and it was provided that in no case need they take any step until their expenses had been provided for. So great was the administrative confusion which these provisions caused and such was the outcry against the fees and expenses that in 1874 an amendment was passed cutting all fees in half, and as a measure of desperation, directing the marshals to compile and submit periodically to the courts voluminous statistics of the proceedings thereafter to be had. The amendments of 1874 were the beginning of the end of the law. In the same year the House passed a bill for repeal.

Similar bills had been introduced in practically every session of Congress after the enactment of the law. In 1876 a repeal measure passed the House unanimously. In 1878 a bill for repeal passed the Senate by a vote of about 6 to 1 and the House by a vote of about 5 to 1.

* * * * * * * * *

The movement for repeal (p. 54) however, was too strong and the law passed out of existence on September 1, 1878. Throughout the debates one may trace the general dissatisfaction with the administrative machinery * * *."

Collier on Bankruptcy, Vol. I (1923, 13th Ed.), page 976:

"Compensation of Referees in General.

a. Comparative legislation.—In England, the registrars receive salaries, not fees. Under previous laws in this country, the officers corresponding to the present referees have always been paid by fees, fixed sometimes by rules, sometimes by the statute, sometimes by both. The fee bills under the law of 1867 grew so long and proved so onerous that they were largely responsible for the repeal of that law.[4] The difference between the two laws in this respect is marked; precedents will be found of little value. Then compensation depended largely on the number of hearings had and papers drawn; now, besides the fixed filing fee, the compensation of referees is determined by the number of claims proven and the amount of assets administered. * * *[7] The reasons behind these—in our jurisprudence—rather novel ways of compensating Federal judicial officers were apparent: the filing fee was intended to cover ordinary services in no-asset cases; the commission on dividends was a pro rata reward dependent, not, as in 1867, on work done, but on the results of that work.

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[4] Thus, see in the Congressional debates, on the pending bankruptcy bill in February, 1898, lurid phrases like: 'the pillage of the fee-fiend', and 'the rodents who burrow around the places of justice'.

[7] The purpose of the law-making power is indicated by the following quotation from the analysis of the bill in its last form:

'Referees will receive a petty filing fee and a small commission on the net amount realized by estates administered before them. This arrangement will interest them in securing prompt and economical administrations.'"

Bray v. *Johnson* (C. C. A. 4, 1908), 166 Fed. 57, 60:

"The temptation, if a referee could thus increase his compensation to err, would be too great. Serious questions involving his personal interest, upon which he would have judicially to pass, would be continually presented, and the result of such a system would soon be disastrous, and bring the courts of bankruptcy into disrepute. The objections to such an allowance are fundamental, aside from the fact that the compensation is fixed by law. To have the pay of a referee, acting in a purely judicial capacity, respecting a particular transaction, in which he acts for and on behalf of the court, measured by the extent of the fund that might be handled under and in pursuance of decrees and orders entered by himself, would be as anomalous as it would be unfortunate, because of the delicate and embarrassing position in which he would be constantly placed, as manifestly his personal and financial interest in what he was doing would frequently arise, and result in having his best motives impugned. * * *

Judicial officers should not be placed in a position where their private interests necessarily become involved in their official action, and, should it ever be done to the extent that the view of the bankrupt law contended for by the referee would bring about, the federal judicial system would sustain a serious blow, and quickly be deprived of its independence, its greatest source of strength with the people and bar. The bankrupt act, in our judgment affords no ground for an interpretation that would be so far-reaching in its results, or bring about such serious consequences."

In re Reiman, et al., 20 Fed. Cases 490, Case No. 11673 (D. C., S. D., N. Y. 1874) (7 Ben. 455; 11 N. B. R. 21), at page 497, affirmed on appeal 20 Fed. Cases 500, 502, Case No. 11,675 (12 Blatchf. 562; 13 N. B. R. 128), (1875), quoting from the District Court opinion of Mr. Justice Blatchford:

> "It is further objected, that the composition in this case provides for payment in notes, and not money and is, therefore not authorized by the statute. I do not think that the composition, properly interpreted, provides for a payment otherwise than in money. The creditors, by it, agree to accept thirty cents on the dollar, in full satisfaction and discharge of their debts, to be paid as prescribed namely, ten per cent. thereof within ten days after the recording of the resolution and the filing of the statement, ten per cent. thereof in four months from September 1st, 1874, and ten per cent. thereof in eight months from September 1st, 1874, notes satisfactorily endorsed to be given for the four and eight months payments. * * * (p. 498). It could scarcely have been intended that a composition should exclude all deferring of payments. Voluntary compositions almost always provide for successive payments at stated times. A composition may well provide for successive payments in money at stated future times, and, if so, there can be no good reason why the stated payments may not be evidenced by notes to be endorsed, if desired the notes being payable in money."

In re Wayne Realty Co., 275 Fed. 955 (D. C. N. D., Ohio, E. D., 1921), Westenhaver, District Judge, at page 957:

> "It is to be noted, first, that the *'consideration'* to be *'paid'* to creditors and the 'money' to pay priority debts and costs are to be 'deposited in such place as designated by' and 'subject to the order of the judge'.
>
> While the act uses the word 'consideration' and not 'money', as that which creditors are to be paid, there are reasons for holding that what is to be deposited must be money, the definite promise of payment of a definite sum or its equivalent, and, in any event, in a form susceptible of distribution direct to creditors. *In other words, the theory of a composition is a payment or promise to pay to creditors of a certain definite amount or other consideration in lieu of a dividend derived from the sale of bankrupt's assets.* It presupposes a consideration and a weighing by the creditors of the relative advantage of what is offered by composition over what may be realized from the assets." (citing many authorities and cases to indicate that a composition is payable in cash and notes).

ATTORNEY GENERAL'S FORM.

Excerpt from the "Report of Referee in Bankruptcy to Clerk", (Form Bankruptcy #1 issued by U. S. Government Printing Office) filled out by all referees to indicate administration expenses for guidance of the Attorney General, who pursuant to §§53 and 54 (11 USCA 81, 82) of the bankruptcy statute, must "annually lay before Congress statistical tables showing for the whole country * * * the expenses of administering such estates, * * *".

If the case is a composition or extension, fill out one of these three headings and OMIT ALL THE REST OF THE PAGE (except the occupational column in the upper right hand corner, which must be filled out in every case). Do not treat as an "Extension" a case in which, after confirmation, the extension is set aside and the estate ordered liquidated by the court. Treat such a case like one normally administered.

COMPOSITION CONFIRMED UNDER §12		COMPOSITION CONFIRMED UNDER §74		EXTENSION (§74)
1	2	3	4	5
Amount of debts composed. (Total of unsecured debts covered by the offer. Exclude debts having priority)	Amount paid or to be paid. (On the debts in the preceding column. Include notes as well as cash in the total)	Amount of debts composed	Amount paid or to be paid	Amount of debts extended (over and above any immediate payments on confirmation)